Agenda Date: 6/21/13
Agenda Item: 2F

STATE OF NEW JERSEY

Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

ENERGY

IN THE MATTER OF THE VERIFIED PETITION OF JERSEY CENTRAL POWER & LIGHT COMPANY FOR REVIEW AND APPROVAL OF INCREASES IN AND OTHER ADJUSTMENTS TO ITS RATES AND CHARGES FOR ELECTRIC SERVICE, AND FOR APPROVAL OF OTHER PROPOSED TARIFF REVISIONS IN CONNECTION THEREWITH; AND FOR APPROVAL OF AN ACCELERATED RELIABILITY ENHANCEMENT PROGRAM ("2012 BASE RATE FILING")	)	ORDER ON INTERLOCUTORY APPEAL
	)	BPU DOCKET NO. ER12111052
	)	OAL DOCKET NO. PUC16310-12

Parties of Record:

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BY THE BOARD:

In response to a Board Order dated July 18, 2012 in Docket No. EO11090528, Jersey Central Power & Light Company ("JCP&L" or "Company") filed a base rate case petition which was transmitted to the Office of Administrative Law ("OAL") on December 10, 2012 for hearing as a contested matter. The case was referred to the Honorable Richard McGill, ALJ ("ALJ McGill").

On December 11, 2012, the Township of Marlboro ("Marlboro"), a municipality located within JCP&L's service territory, moved to intervene as a party in the proceeding. ALJ McGill granted Marlboro's motion to intervene in accordance with N.J.S.A. 48:2-32.2 on January 25, 2013. ALJ

McGill has also granted intervener status to additional municipalities: West Milford, Tewksbury, Wayne and Robbinsville Townships and the County of Morris.

By notice of motion dated April 17, 2013, Marlboro requested that the ALJ order JCP&L to establish an escrow fund for the use of Marlboro and other municipal Interveners to fund the expert and professional fees Marlboro will have to expend to participate meaningfully in the matter through discovery, analysis of data, preparation of expert testimony, motion practice, examination of JCP&L's experts at the evidentiary hearings, and other related tasks. Marlboro maintained that it was appropriate for JCP&L to establish an escrow account in the initial amount of $175,000, with possible replenishment of an additional $50,000, to cover the costs of Marlboro's professional fees. Marlboro pointed to the action of PSE&G in establishing an escrow fund for the municipalities that were participating in the review of the Susquehanna-Roseland line, and asserted that there was no legal impediment to JCP&L establishing a similar fund in connection with the rate case as more than rates are at issue.[1] Marlboro maintained that it could not fund these experts on its own and it would be inequitable to let JCP&L frustrate Marlboro's efforts to seek a full accounting of JCP&L's past inactions.

JCP&L and the New Jersey Division of Rate Counsel ("Rate Counsel") opposed Marlboro's motion. By letter dated April 26, 2013, JCP&L maintained that Marlboro's request for an escrow fund was without merit as there is no legal or regulatory authority that requires a public utility to fund an intervener's expert or professional fees in a rate case. JCP&L asserted that Marlboro's reliance on the PSE&G Susquehanna-Roseland matter was misplaced, and that the Board actually denied the request that it require PSE&G to establish such a fund while noting that PSE&G had volunteered to do so.[2] JCP&L contended that the same statute, N.J.S.A. 48:2-32.2, that provided Marlboro with the right to intervene, also provides the means for Marlboro to pay its expert and professional fees. In relevant part, the statute provides that the intervening municipality

> may employ such legal counsel, experts and assistants as may be necessary to protect the interest of the municipality or municipalities or the public within the municipalities or municipalities. Such municipality or municipalities may by emergency resolution raise and appropriate the funds necessary to provide reasonable compensation and expenses of such legal counsel, experts and assistants. [N.J.S.A. 48:2-32.2]

JCP&L asserted that given this express means for raising the necessary funds provided by the legislature, there is no basis to require that other ratepayers subsidize Marlboro's expenses. JCP&L also maintained that establishing an escrow account for the expenses of interveners would be contrary to Board policy and establish a dangerous precedent.

In its April 25, 2013 letter in opposition, Rate Counsel asserted many of the same arguments advocated by JCP&L adding that Marlboro's request lacks any legal foundation and that JCP&L's ratepayers should not be required to pay the costs of any single group of customers. The legislature has entrusted Rate Counsel with the task of protecting ratepayer interests,

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[1] In re Petition of Public Service Electric and Gas Co. for a Determination Pursuant to the Provisions of N.J.S.A. 40:55D-19 (Susquehanna-Roseland) BPU Docket No. EM09010035 ("Susquehanna-Roseland").
[2] Susquehanna-Roseland, Order dated 5/14/09.

including those of the municipalities served by the public utilities. According to Rate Counsel, it is only equitable that the taxpayers of the municipalities that intervened, and not other JCP&L ratepayers, pay for such representation.

Marlboro responded to the opposition filed by JCP&L and Rate Counsel by letter brief dated May 6, 2013. Marlboro maintained that it and the other municipal interveners have a unique interest and position in the rate case that is separate and apart from the interests represented by Rate Counsel. Only Marlboro and the other municipal interveners can adequately represent the interests of the citizens who were forced to endure the company's failures in the wake of Irene and Sandy, and who should not be forced to do so again in the future, giving them a different perspective on the need for community-based remedial efforts. Marlboro does not contend that it has a statutory right to the escrow fund, rather that nothing prevents ordering JCP&L to establish such a fund based on equitable considerations, including the magnitude of the devastations resulting from Sandy or the consistent failures of the company to respond to such disasters. The establishment of a reasonable escrow fund is not unprecedented and the legislature and courts have found it appropriate to require payment of fees for attorneys and other professionals when it was deemed inequitable to have a successful party use its own funds to right a wrong. Marlboro maintains that the current circumstances qualify and that the minimal ratepayer contribution requested to fund the unique perspective of Marlboro and the other municipal interveners is not reasonable under these circumstances.

The townships of Tewksbury, Wayne and Southampton submitted letters in support of Marlboro's motion for establishment of a municipal escrow fund.

By order dated May 22, 2013, ALJ McGill denied Marlboro's motion to compel JCP&L to establish an escrow fund. ALJ McGill stated that "...it appearing that the arguments in opposition to the motion are more persuasive, it is therefore ORDERED that Marlboro's motion is denied."

Marlboro's Request for Interlocutory Appeal

On June 3, 2013, Marlboro filed a Request for Interlocutory Review of ALJ McGill's order denying its motion to compel JCP&L to establish an escrow fund for Marlboro's use to retain experts and professionals to assist it in the rate case. According to Marlboro, its significant concerns regarding the commitment of JCP&L to ensuring future reliability of its electric distribution system and its concerns regarding JCP&L's inability to respond rapidly and effectively to Major Storm Events, requires meaningful participation by the township in the base rate case. Marlboro argues that in order to achieve meaningful participation and act as an advocate who will insist on JCP&L making significant commitments to the repair and restoration of its distribution system, Marlboro must retain experts who can analyze the voluminous discovery in the base rate case. Marlboro asserts that it intervened in the base rate case because it opposes the requested rate increase but even more importantly to hold JCP&L accountable for its failure to adequately respond to the effects of Sandy and its failure to effectively restore and rebuild its power distribution system. Unless Marlboro is able to retain qualified professionals to match those retained by JCP&L, it will not be able to effectively advocate for its residents and businesses. Marlboro has no line item in its budget to cover the costs of the needed experts, and it is not equitable to burden its taxpayers with the costs of retaining experts and professionals to hold JCP&L accountable to established reliability standards. As demonstrated by the Susquehanna-Roseland Order, the concept of establishing an escrow fund is not unique. While Marlboro concedes that the Board denied the request, it

argues that the Board did so after PSE&G voluntarily agreed to provide the fund and did not disapprove of the utility paying the fees. An escrow fund should be made available to Marlboro to insure that JCP&L commits to a schedule of repairs, and accounts for its responses to the 2011 and 2012 storms. Marlboro submits that there is no legal impediment to ordering the set aside of the small amount requested, and the adequacy of JCP&L's performance is properly within the rate case proceeding. Marlboro reiterated its belief that it and the other municipal interveners have a unique interest and position in the proceeding that is distinct from that represented by Rate Counsel. Marlboro concludes that given the wide-scale devastations resulting from Sandy and JCP&L's responses, this matter is unique and justifies, as a matter of public policy and fundamental fairness, the establishment of the requested escrow.

In response, by letter brief dated June 6, 2013, JCP&L argued that Marlboro's request for interlocutory review raises no new legal or factual arguments and is simply a recitation of the same arguments presented to and rejected by ALJ McGill, and fails to satisfy the standard for the grant of interlocutory review articulated in In re Uniform Administrative Procedure Rules, 90 N.J. 85, 90(1982). Accordingly, JCP&L maintains that the request for interlocutory appeal should be denied. Additionally, Marlboro has failed to identify any legal authority requiring a public utility to fund the professional fees of an intervener in a rate case. PSE&G's voluntary establishment of an escrow fund in the context of the Susquehanna-Roseland case provides no support for the current request. Marlboro's claims of financial hardship are both unsupported and irrelevant given the clear statutory direction on the funding of the municipality's fees at its own cost and expense. See N.J.S.A. 48:2-32.2. According to JCP&L, Board policy does not support the establishment of an escrow fund for intervener expenses and doing so could create a dangerous precedent which could impose unnecessary and duplicative costs on JCP&L's ratepayers.

Rate Counsel also responded by letter dated June 6, 2013 agreeing with JCP&L that there is no basis for granting interlocutory appeal, and relying on its brief submitted to ALJ McGill since Marlboro has simply repeated the arguments already made. Rate Counsel also expressed its concern that based on the various "me too" letters of the other townships, granting the right to an escrow fund could require ratepayers to pay large sums of money for what Rate Counsel sees as mostly redundant efforts.

By letter dated June 10, 2013, Marlboro clarified that if the Board approved an escrow fund, the fund would be used by all of the municipal interveners jointly to pay for the assistance of experts.

DISCUSSION AND FINDINGS

An order or ruling of an ALJ may be reviewed interlocutorily by an agency head at the request of a party. N.J.A.C. 1:1-14.10(a). Pursuant to N.J.A.C. 1:14-14.4(a), a rule of special applicability that supplements N.J.A.C. 1:1-14.10, the Board shall determine whether to accept the request and conduct an interlocutory review by the later of (i) ten days after receiving the request for interlocutory review or (ii) the Board's next regularly scheduled open meeting after expiration of the 10-day period from receipt of the request for interlocutory review. In addition, under N.J.A.C. 1:14-14.4(b), if the Board determines to conduct an interlocutory review, it shall issue a decision, order, or other disposition of the review within 20 days of that determination. Under N.J.A.C. 1:14-14.4(c), if the Board does not issue an order within the timeframe set out in N.J.A.C. 1:14-14.4(b), the judge's ruling shall be considered conditionally affirmed. However,

the time period for disposition may be extended for good cause for an additional 20 days if both the Board and the OAL Director concur.

The legal standard for accepting a matter for interlocutory review, as noted by JCP&L, is stated in In re Uniform Administrative Procedure Rules, 90 N.J. 85 (1982). In that case, the Court concluded that an agency has the right to review ALJ orders on an interlocutory basis "to determine whether they are reasonably likely to interfere with the decisional process or have a substantial effect upon the ultimate outcome of the proceeding." Id. at 97-98. The Court also held that the agency head has broad discretion to determine which ALJ orders are subject to review on an interlocutory basis. However, it noted that the power of the agency head to review ALJ orders on an interlocutory basis is not itself totally unlimited, and that interlocutory review of ALJ orders should be exercised sparingly. In this regard, the Court noted:

> In general, interlocutory review by courts is rarely granted because of the strong policy against piecemeal adjudications. See Hudson v. Hudson, 36 N.J. 549 (1962); Pennsylvania Railroad, 20 N.J. 398. Considerations of efficiency and economy also have pertinency in the field of Administrative law. See Hackensack v. Winner, 82 N.J. at 31-33; Hinfey v. Matawan Reg. Bd. of Ed., 77 N.J. 514 (1978). See infra at 102, n.6. Our State has long favored uninterrupted proceedings at the trial level, with a single and complete review, so as to avoid the possible inconvenience, expense and delay of a fragmented adjudication. Thus, "leave is granted only in the exceptional case where, on a balance of interests, justice suggests the need for review of the interlocutory order in advance of final judgment." Sullivan, "Interlocutory Appeals," 92 N.J.L.J. 162 (1969). These same principles should apply to an administrative tribunal.
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> [90 N.J. at 100].

The Court held that interlocutory review may be granted "only in the interest of justice or for good cause shown." Ibid. In defining "good cause," the Court stated:

> In the administrative arena, good cause will exist whenever, in the sound discretion of the agency head, there is a likelihood that such an interlocutory order will have an impact upon the status of the parties, the number and nature of claims or defenses, the identity and scope of issues, the presentation of evidence, the decisional process, or the outcome of the case.
>
> [Ibid.].

As stated above, the decision to grant interlocutory review is committed to the sound discretion of the Board, and is to be exercised sparingly to avoid piecemeal adjudication. However, given the possible impact on the actions of Marlboro and the other municipal interveners on the one hand, and the question of the possible precedent set for future rate base cases of requiring (or denying) the request that a utility establish an escrow for expert costs for an intervening municipality, the Board **FINDS** that interlocutory review is warranted here. Accordingly, the Board **HEREBY GRANTS** Marlboro's request for interlocutory review of ALJ McGill's May 22, 2013 Order.

Turning to the merits of Marlboro's request, Marlboro states that, along with its opposition to a base rate increase, it has significant concerns regarding JCP&L's commitment to the reliability of its electric distribution system and its ability to respond rapidly and effectively to crises like Superstorm Sandy. These concerns stem from its frustration with what it believes to have been JCP&L's poor response time to handle the many issues occurring during and after the Major Storm events which led to unprecedented power outages for long periods of time for its residents. It argues that JCP&L has demonstrated historical failures to provide electrical service to its 15,364 JCP&L residential customers. Marlboro cites the May 29, 2009 Susquehanna-Roseland Order[3] as support for its argument that there is no legal impediment to utility funding an escrow for interveners' costs for professional experts to participate effectively in a public utility proceeding. Marlboro concedes that there is no statutory basis for its request but asserts that it is equitable for its fees to be funded by JCP&L (and ratepayers) in light of its unique perspective and commitment to holding JCP&L accountable for its past failures and to ensuring timely and full remediation.

JCP&L argues that Marlboro has not presented any legal authority for requiring JCP&L to fund professional expenses of a municipal intervener, and in fact has presented flawed unsupported allegations and failed to identify and acknowledge statutory language that contravenes its request. JCP&L cites the same Susquehanna-Roseland decision, underscoring that the Board denied the motion of several interveners to require PSE&G to establish an escrow fund for experts. JCP&L specifically highlighted language from the Order:

> To date, based upon research and review, the Board has not required a petitioner to establish an escrow account for interveners in a case involving an application pursuant to N.J.S.A. 40:55D-19. The Board is under no statutory requirement to require that a petitioner establish an escrow account for interveners, and at this time, the Board does not find any compelling reason to do so. Therefore, the Board HEREBY DENIES, without prejudice, the motions for the establishment of an escrow account to be funded by PSE&G so that interveners could use those funds to pay for experts in this proceeding.
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> [Susquehanna Roseland Order at 4]

Rate Counsel agrees with JCP&L that Marlboro has presented no legal authority that supports its position that it is appropriate to require JCP&L and ratepayers to cover Marlboro's fees, especially since Rate Counsel is available, with its resources, to advocate and investigate on behalf of all ratepayers.

Rate Counsel and JCP&L point to the authority granted to municipalities by N.J.S.A. 48:2-32.2 to both retain professionals for assistance in participating in "any hearing or investigation held by the board, which involves public utility rates, fares or charges, service or facilities," and to raise the funds to pay those professionals by emergency resolution. Rate Counsel and JCP&L maintain that this provision clearly establishes that the Legislature expected municipalities to pay their own way, and Marlboro has failed to prove that any deviation from the statutory scheme is warranted here.

[3] In re the Petition of Public Service Electric and Gas Company for a Determination Pursuant to the Provisions of N.J.S.A. 40:55D-19 (Susquehanna-Roseland), BPU Docket No. EM09010035.

Both Rate Counsel and JCP&L raise concern about the precedent that could be set if the Board requires an escrow to pay interveners' professional fees and expenses, even if the amounts requested are small in comparison to the total rate increases at issue or some other metric. Marlboro asserts that the request is justified by the unique circumstances of this case, and the commitment that all municipal interveners will share in the use of the fund and there will be no proliferation of requests.

Having carefully considered the submissions, and having reviewed the applicable statutes and cases, the Board **HEREBY FINDS** no legal authority to support Marlboro's request to compel JCP&L to establish an escrow to cover the fees and costs of counsel, experts and assistants retained by the municipalities.

Marlboro has also argued that it would be inequitable to require its taxpayers to shoulder the burden of these costs, notwithstanding the authority provided by N.J.S.A. 48:2-32.2 for municipalities to raise these funds from their residents. According to Marlboro, JCP&L should be required to establish an escrow fund to pay the reasonable professional fees and expenses of the interveners as a matter of fundamental fairness, equity, and sound public policy.

The Board is obligated to follow the terms and objectives of the statute. "[A]dministrative agencies are part of the executive branch of government, charged under the State constitution with the responsibility of faithfully executing the laws." In re Appeal of Certain Sections of Uniform Administrative Procedure Rules, 90 N.J. 85, 93 (1982) (citing N.J. Const. (1947), Art. 5, § 1, para. 11)). See also T.H. v. Division of Developmental Disabilities, 189 N.J. 478, 491 (2007) (an administrative agency may not "alter the terms of a legislative enactment or frustrate the policy embodied in the statute.").

The Board, like a court, must apply legislative enactments in accordance with the plain intent and language used by the legislature, and should not act in equity when there is an adequate remedy at law. See Cohen v. Dwyer, 133 N.J. Eq. 226, 229 (Ch. 1943), aff'd 134 N.J. Eq. 350, 351 (E. & A. 1943). Likewise, equity may not disregard statutory law, but looks to its intent rather than its form. Sheridan v. Sheridan, 247 N.J. Super. 552, 559 (Ch.Div. 1990). Equitable relief is not available where an existing administrative procedure created by statute is an adequate remedy that assures full protection of rights and offers complete relief. Overall, equity may not be invoked to avoid application of a statute and by doing so usurp the legislative role under the guise of equity. See Crusader Servicing Corp. v. City of Wildwood, 345 N.J. Super. 456, 464 (Law Div. 2001).

As previously discussed, N.J.S.A. 48:2-32.2 provides a municipality with a means to raise the funds needed to pay for the assistance of professionals that it determines it needs to effectively represent the interests of its residents in a Board proceeding. The Board is not persuaded that Marlboro has provided any reason for the Board to override the legislative intent as expressed in the statute that the municipality must fund its own expenses, and instead shift those expenses to all of JCP&L's ratepayers. Therefore, the Board **FINDS** no basis to compel JCP&L to establish an escrow fund for the municipal interveners' costs and expenses as a matter of equity.

Therefore after reviewing the submissions of Marlboro, JCP&L and Rate Counsel, and after due consideration of the arguments and the law, the Board **HEREBY AFFIRMS** the decision of ALJ McGill denying Marlboro's motion to compel JCP&L to establish an escrow fund for the use of Marlboro and other municipal Interveners to fund expenses of attorneys and other

professionals. The Board encourages Marlboro and the other municipal interveners to work cooperatively to the fullest extent possible with other parties, including Rate Counsel, so that experts are used in a manner that leads to a just and reasonable resolution of the case.

DATED: 6/21/13

BOARD OF PUBLIC UTILITIES
BY:

ROBERT M. HANNA
PRESIDENT

JEANNE M. FOX
COMMISSIONER

JOSEPH L. FIORDALISO
COMMISSIONER

MARY-ANNA HOLDEN
COMMISSIONER

ATTEST:

KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities

IN THE MATTER OF THE VERIFIED PETITION OF JERSEY CENTRAL POWER & LIGHT COMPANY FOR REVIEW AND APPROVAL OF INCREASES IN AND OTHER ADJUSTMENTS TO ITS RATES AND CHARGES FOR ELECTRIC SERVICE, AND FOR APPROVAL OF OTHER PROPOSED TARIFF REVISIONS IN CONNECTION THEREWITH; AND FOR APPROVAL OF AN ACCELERATED RELIABILITY ENHANCEMENT PROGRAM ("2012 BASE RATE FILING")

BPU DOCKET NO. ER12111052
OAL DOCKET NO. PUC16310-12

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